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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CAROL GALLOWAY, Petitioner, v. THE SUPERIOR COURT OF SAN MATEO COUNTY, Respondent; BAYFRONT COURT HOMEOWNERS ASSOCIATION, et al., Real Parties in Interest.	A106611 (San Mateo County Super. Ct. No. 414245)

This is an attempted appeal from an order of the Superior Court of San Mateo County imposing sanctions in the amount of $1,500 for failure to make a personal appearance at a mandatory settlement conference conducted on October 16, 2003. The purported appellant, Carol Galloway, contends that the trial court abused its discretion in imposing sanctions, both because of the underlying factual circumstances, and because sanctions were imposed without notice and hearing.

JURISDICTION

At the threshold is the question whether the subject sanctions order is appealable at all. Under Code of Civil Procedure section 904.1, a superior court order or judgment directing payment of monetary sanctions of $5,000 or less is not appealable except after entry of final judgment, and may only be reviewed "at the discretion of the court of appeal . . . upon petition for an extraordinary writ." (Code Civ. Proc., § 904.1, subd. (b).)

Because the sanction order at issue amounts to less than $5,000, the purported appeal is of doubtful validity. (*Ibid.*; *County of Monterey v. Mahabir* (1991) 231 Cal.App.3d 1650, 1653; but see *Barton v. Ahmanson Developments, Inc.* (1993) 17 Cal.App.4th 1358, 1361 [sanctions order imposed against former attorney appealable under final "as to one party" exception to one final judgment rule].)

Nevertheless, in view of unresolved questions as to whether the order may be appealable, the fact that review by extraordinary writ is now the statutorily-prescribed mode of review for orders imposing sanctions in amounts under $5,000, and in the interests of justice, we exercise our discretion to treat the purported appeal in this case as a petition for extraordinary writ. (*Olson v. Cory* (1983) 35 Cal.3d 390, 398-401; *Zabetian v. Medical Board* (2000) 80 Cal.App.4th 462, 466; Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) ¶¶ 2:7, 2:8, 2:8.1, pp. 2-2 to 2-5.

INADEQUATE BRIEFING AND RECORD

At the outset, we are confronted with the inadequacy of Galloway's briefing and the barely adequate record she has submitted to substantiate her claim. In her brief, she makes numerous factual claims without any citation to the record. "Such briefing is manifestly deficient. [¶] 'The rule is well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his [or her] brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. [Citation.] It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings.' [Citations.]" (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887; see Cal. Rules of Court, rule 14(a)(1)(C); *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 782; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 & fn. 16.)

We must also take into account the inadequacy of the appellate record before us. Galloway has failed to provide us with the transcript of the hearing held on April 8, 2004,

at which the superior court considered her objection to imposition of sanctions. Moreover, we note that after electing to proceed in accordance with California Rules of Court, rule 5.1 by submitting an appendix in lieu of clerk's transcript, Galloway submitted only a partial record of the litigation, with apparent gaps in documentation. By failing to request a reporter's transcript and appealing on the basis of a partial record, appellant has prevented us from reviewing all the evidence in the case in order to evaluate her arguments on this appeal. "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters.* To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.]" (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385-386 ["When an appeal is taken on a partial clerk's transcript, the evidence is conclusively presumed to support the judgment"].)

FACTUAL AND PROCEDURAL BACKGROUND

As best we can glean from the meager record before us, appellant Galloway was an adjuster with Meadowbrook Claims Service (Meadowbrook), the claims adjuster for Star Insurance, the insurance carrier for Diablo Landscape, Inc. (Diablo), one of the parties in an underlying construction defect dispute being litigated in San Mateo County Superior Court case number 414245. On September 12, 2003, the court, through its appointed special master, issued a Notice of Court Mandated Settlement Conference, to be held on October 16, 2003, at 9 a.m., with the trial judge presiding. The Notice stated that "[a]ll counsel, principals and/or insurance claims representatives . . . with full settlement authority are ordered to attend. Any request for appearances by telephone standby shall be made directly with the Court." The special master notified all counsel of the court-mandated settlement conference by letter dated September 12, 2003. The special master's letter reiterated "that the court requires principals and insurance representatives on behalf of all parties to attend," and stated that the trial judge "has specifically informed me that I have no authority to allow telephonic standby or other dispensations from the local court rules."

The proof of service shows that the letter and court Notice were served on Susan P. Grey, Esq., the attorney representing the interests of the insured. By letter dated October 1, 2003, attorney Grey notified appellant Galloway of the mandatory settlement conference set for October 16, 2003, adding that "This one is important." Galloway denies having received this letter, or having received any other notification of the mandatory settlement conference set for October 16 until learning of it either on October 14 during a telephone conversation with Grey, or on October 15 through some other means.

Galloway failed to attend the mandatory settlement conference on October 16, 2003. On October 20, 2003, the trial court issued a notice and order for sanctions, imposing sanctions of $1,500 on Galloway pursuant to rule 227 of the California Rules of Court and rules 2.3, 2.4 and 2.5 of the Local Rules of the Superior Court of San Mateo County, for her failure to attend the mandatory settlement conference as an insurance representative with authority to settle. The order was mailed to attorney Grey, who transmitted it to Galloway on November 4, 2003.

Galloway thereafter sent several letters to the court requesting reconsideration or vacating of the sanctions order. On March 24, 2004, the trial court issued a Notice of Hearing Re: Sanctions, ordering Galloway to appear on April 8, 2004, regarding imposition of sanctions for her failure to appear at the mandatory settlement conference. At the hearing on April 8, 2004, the trial judge "advised Ms. Galloway why sanctions of $1,500 were ordered," and ordered her to submit no later than April 15, 2004, a declaration from attorney Grey "stating that [neither] she nor anyone in her office received notice of the Mandatory Settlement Conference until 2 days before the scheduled hearing." The court stated that "Upon receipt of [such a] declaration, [it would] consider vacating sanctions."[1]

[1] Appellant has not provided this court with any transcript of the hearing on April 8, 2004. This summary of what occurred at the hearing is taken from the minute order provided in appellant's appendix.

On April 13, 2004, in lieu of a declaration from attorney Grey, Galloway submitted her own declaration under penalty of perjury, stating that she had not received any notification of the mandatory settlement conference "until late in the afternoon of October 14th, 2003." On April 16, 2004, the superior court notified Galloway that the trial judge had denied her request to vacate and set aside the sanctions order, and that the sanctions of $1,500 were "now due and payable." This purported appeal followed.

DISCUSSION

As Galloway concedes, the standard of review of any order imposing sanctions is abuse of discretion; and where a trial court has discretionary power to decide an issue, its exercise of that discretion will not be disturbed on appeal in the absence of a clear showing of abuse, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479; Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs, *supra,* ¶¶ 8:87 to 8:87.1, pp. 8-34 to 8-35.) The burden is on the complaining party to establish abuse of discretion (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 331), and any showing on appeal will be deemed insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion. (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138.)

As our review of the facts makes clear, Galloway places entire blame for her failure to receive notice of the mandatory settlement conference on the failure of "the attorney assigned to represent the interests of the insured" by the insurance company for whom Galloway was working. It is well-established statutory law that "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." (Civ. Code, § 2332.) While an agent is under a duty to

inform her principal about agency-related matters of which the principal should know, the principal will generally be charged with such notice even when it is not given. (*Northern Natural Gas Co. v. Superior Court* (1976) 64 Cal.App.3d 983, 992-993; *Columbia Pictures Corp. v. DeToth* (1948) 87 Cal.App.2d 620, 630; Rest.2d Agency, §§ 268, 272, 275; 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 99, pp. 97-98.) Thus, a litigant's knowledge of a court order may be established by proof that a copy of the order was served upon his or her attorney, unless proven otherwise by strong contradictory evidence. (*Freeman v. Superior Court* (1955) 44 Cal.2d 533, 537.)

On the limited record before us, it is clear that both Grey and the court treated the former as the attorney representing the interests not only of the insured, but those of the insured's carrier. As the insurance carrier for Diablo, a cross-defendant in the underlying litigation, Star Insurance undertook the defense of its insured, and assigned attorney Grey to represent Diablo's interests in the underlying litigation. As the attorney *assigned by the insurance carrier* to represent the interests of its insured, Grey was *employed by Star Insurance* on behalf of Diablo. In acting as Diablo's attorney in the context of this litigation, then, Grey was in fact representing the interests not only of Diablo, but of Star Insurance as well. Although the formal notice of the court-mandated settlement conference was directed at "[a]ll counsel, principals and/or insurance claims representatives," the service list attached to and incorporated by reference in the proof of service shows that the notice was served *only* on counsel, including Grey. Thus, the court itself treated Grey as attorney for service of this important notification not only on the parties to the litigation, but on the "insurance claims representatives" of the carriers defending those parties, including Star Insurance.

To the extent the partial record gives any indication of Galloway's status with respect to the carrier, it appears she was one of the "insurance claims representatives" referred to in the court's notice. As such, it may reasonably be inferred that she herself was an agent of Star Insurance, and that Grey was acting as her attorney *in the context of and for the limited purposes of this litigation*. This inference is supported by the record

of Grey's communications with Galloway, which show that *both* Grey *and* Galloway viewed the attorney as acting on Galloway's instructions, which were in turn given by Galloway on behalf of Star Insurance.[2] Significantly, Grey submitted her billing invoice for professional services *directly to Galloway herself* on behalf of both the insured (Diablo) and its insurance carrier. The trial court gave every indication that it viewed Galloway as an agent of Star Insurance, and Grey as the attorney representing her interests in that respect. Thus, when it issued its notice and order for sanctions on October 20, 2003, the trial court served it on "Carol Galloway, Star Insurance[,] c/o Susan Grey, Esq." Grey in turn notified Galloway of the sanctions order. Thus, the record shows that both the trial court and Grey herself acted as though, for purposes of the underlying litigation, Grey was Galloway's agent.

Moreover, Galloway has not contested the trial court's apparent assumption that Grey was her attorney for purposes of the underlying litigation. She has only asserted that Grey was "the attorney hired by Star Insurance" or "the attorney hired by Meadowbrook," and that Grey failed to give her timely notification of the mandatory settlement conference ordered by the trial court. Appellant having failed either to argue that Grey was not her attorney or her agent for purposes of the litigation, or to provide the reporter's transcript of the relevant hearing before the trial court on her objection to imposition of sanctions, we presume that the trial court's determination was supported by the evidence (*Estate of Fain, supra,* 75 Cal.App.4th at p. 992; *Sui v. Landi, supra,* 163 Cal.App.3d at pp. 385-386), and conclude that appellant has waived any legal claim that Grey was not her agent for purposes of receiving notice on her behalf of the court-ordered mandatory settlement conference. On this basis, we cannot find any abuse of discretion in the trial court's decision imputing to Galloway the timely notice given to her attorney Grey regarding the mandatory settlement conference.

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[2] Note particularly the email message from Grey to Galloway dated November 25, 2003, notifying the latter of settlement of a portion of the litigation affecting Diablo. The message refers to Diablo as "your insured," addresses Galloway throughout as though she was the agent for Star Insurance, and concludes with Grey's statement, "As always it was a pleasure representing your interests in this matter."

Galloway also contends that the trial court abused its discretion by imposing sanctions without giving the requisite notice and hearing. (Code Civ. Proc., § 177.5; Cal. Rules of Court, rule 227(b), (c).) On the partial record before us, it appears that the trial court's "Notice and Order for Sanctions" of October 20, 2003, was issued without any *prior* notice or hearing. Nevertheless, under the circumstances, and on the inadequate record submitted by Galloway, we conclude that the trial court's subsequent "Notice of Hearing Re: Sanctions," filed on March 24, 2004, together with the hearing held on April 8, 2004, sufficiently complied with the requirements of due process and Code of Civil Procedure section 177.5 to cure any abuse of discretion arising from the earlier failure to provide notice and hearing. (Cf. *Bergman v. Rifkind & Sterling, Inc.* (1991) 227 Cal.App.3d 1380, 1386-1387 [trial judge abused discretion in imposing sanctions on attorney based on findings issued before its review of attorney's explanation, and in denying reconsideration thereof without hearing attorney's evidence of "good cause" under Rule 227].)

DISPOSITION

The appeal is construed as a petition for extraordinary writ pursuant to Code of Civil Procedure section 904.1, subdivision (b). As such, the petition is denied.

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McGuiness, P.J.

We concur:

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Parrilli, J.

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Pollak, J.